In The

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Supreme Court of the United States

October Term, 1975

No. 75-1188

PETER V. KEILEY,

Petitioner,

vs.

ELBERT HINKSON, ABRAHAM D. BEAME and HARRISON J. GOLDIN,

Respondents.

PETITIONER'S SUPPLEMENTAL BRIEF AND REPLY TO RESPONDENTS' MEMORANDUM IN OPPOSITION

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This supplemental brief and reply by petitioner, under subparagraphs 4 and 5 of Rule 24 of the Rules of the Supreme Court, is necessary to refute respondents' desperate assertion that petitioner neither pleaded nor briefed in the courts below the revenue Questions Presented to the Supreme Court by

petitioner, and to raise new matter material to resolution of the issues presented. The revenue issues were pleaded and briefed in both courts below but the respondents and courts chose to ignore the claims and arguments. In fact, respondents once again fail to meet the underlying revenue issue (Question Presented No. 2), as well as Judge Thompson's memorandum barring petitioner's access to the courts concerning the alleged "judgments", and other matters raised below and in the petition.

I.

Paragraph 27 of the amended complaint (pp. 13-14 of the Appendix in the Second Circuit) raises the revenue issue as follows:

> "27. The New York Vehicle and Traffic Law and Chapter 40 of the New York City Administrative Code, both enacted by the New York State Legislature, establishing the New York City Parking Violations Bureau removed parking violation hearings and appeals from the courts of New York to the Parking Violations Bureau, an administrative body, whereby the right to trial by jury, the rules of evidence in the conduct of hearings and appeals, affidavits of military service and other procedural safeguards were eliminated or denied to alleged parking violators, for the alleged purpose of 'streamlining' the administration of parking-violation 'justice.' Actually, defendants are using a quasi-criminal process to raise substantial amounts of revenue for New York City and placing the burden of this unconstitutional scheme of taxation on the persons who can least afford to pay."

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In petitioner's "Memorandum in Support of Motion for Convening of Three-Judge Court," dated January 21, 1975 (Doc. No. 9 in Index to Record), petitioner specifically identified (at p. 2) the revenue issue as a primary issue in this litigation, as follows:

> "(1) the raising of tens or hundreds of millions of dollars of revenue for New York City after payment of expenses relating to enforcement of parking laws, thereby making the statutes revenue statutes without the necessary legislative approvals. . . ."

Also, in the memorandum at pp. 9-11, petitioner discussed revenue under the heading:

> "AUTHORIZING THE ASSESSMENT OF ADDITIONAL 'PENALTIES' OR 'FEES' IN THE EVENT OF NON-PAYMENT OR DELAYED PAYMENT OF THE FINES FOR A PARKING VIOLATION WITHOUT LEGISLATIVE STANDARDS FOR ESTABLISHING THE AMOUNT OF THE PENALTIES OR FEES AUTHORIZES THE RAISING OF REVENUES UNDER THE POLICE POWER OF NEW YORK STATE IN VIOLATION OF THE 14th AMENDMENT TO THE UNITED STATES CONSTITUTION."

Also, in the memorandum at pp. 11-12, petitioner discussed revenue under the heading:

> "AUTHORIZING THE ASSESSMENT OF ADDITIONAL PENALTIES OR FEES FOR NON-PAYMENT OR DELAYED PAYMENT OF PARKING FINES IS (1) A DENIAL OF EQUAL PROTECTION OF THE LAWS; (2) THE TAKING OF PROPERTY WITHOUT DUE PROCESS OF LAW; AND (3) IMPOSITION OF EXCESSIVE FINES."

Also, at pp. 13-14, petitioner raised the issue again under a listing of alleged "Constitutional Defects" in the New York statutes, as follows:

> "[Par. 2] Revenues of Bureau are not used to pay expenses of Bureau. A revenue statute in violation of N.Y.S. Constitution; and use of police power to raise revenues, a denial of due process. 'Amounts available by appropriation' shows revenues are unrelated to expenses.
>
> [Par. 6] Remits all fines and penalties to financial administrator; shows revenue raising unrelated to cost of administration of Bureau; see Par. 2 above."

Also, at p. 20, petitioner discussed the following revenue issue:

> "THE TWO STATUTES ARE AN UNCONSTITUTIONAL MEANS FOR NEW YORK CITY TO RAISE SUBSTANTIAL REVENUES."

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Respondents did not meet any of these revenue issues in the District Court and District Judge Wyatt failed to mention specifically any of the revenue issues in his opinion.

In petitioner's brief in the Second Circuit, petitioner raised the revenue issue at various points, as follows:

> "STATEMENT OF THE ISSUES PRESENTED
>
> 3. Is the issue of whether the stepped-up penalties assessed against a car owner for delayed payment of a traffic ticket a substantial issue under the Equal Protection Clause or Due Process Clause of the 14th Amendment to the United States Constitution? (p. 1).
>
> 4. Is the issue of whether a state or local government may raise substantial revenues (after related expenses) under a police power a substantial issue under the Due Process Clause of the 14th Amendment to the United States Constitution? (p. 2).
>
> . . . Also, plaintiff claims that the PVB's raising of revenues for New York City in substantial excess over related expenses is an unconstitutional application of the statutes granting the PVB the police power to regulate parking. (p. 11).

. . . In addition, the court below erred by rendering a final judgment based on conflicting affidavits involving controlling facts, without affording plaintiff an opportunity for discovery or an opportunity to offer additional evidence at an evidentiary hearing. (p. 12).

Finally, plaintiff will show that the application of the two statutes is unconstitutional because the New York municipalities are using the statutes to raise substantial revenues (after related expenses) under the police power, in violation of the Due Process Clause of the 14th Amendment. The difference between a small-town motorist trap where the mayor presides as the police justice and the existing situation in New York City and other cities in New York State is difficult if not impossible to perceive. *Ward v. Village of Monroeville*, 409 U.S. 57 (1972), quoting *Tumey v. Ohio*, 273 U.S. 510 (1927). (p. 13).

. . . See also *Ward v. Village of Monroeville, supra; Tumey v. Ohio, supra* . . . (p. 18).

USING A POLICE POWER TO RAISE SUBSTANTIAL REVENUES IS A DENIAL OF DUE PROCESS UNDER THE 14th AMENDMENT

The assessment and collection of fines and penalties can be the proper exercise of the police

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power of the state. But it can also be a means of taxation, when the amount raised through the assessment and collection of fines and penalties bears no reasonable relationship to the cost of enforcement of the police power in question. See *Automobile Club of Missouri v. St. Louis,* 334 S. W. 2d 355, 83 A.L.R. 2d 612 (1960) and *Matter of Freidus v. Leary* , 66 Misc. 2d 70 (Spec. Term, N.Y. Co. 1971), *reversed on other grounds,* 38 A.D. 2d 919 (1972), *aff'd* 32 N.Y. 2d 869 (1973), relating to the $75 penalty assessed for the towing of illegally-parked automobiles by New York City. The court said in part:

'The penalty cannot . . . be raised arbitrarily to whatever figure would discourage the brashest and most foolhardy parker. "Excessive fines" are constitutionally prohibited (U.S. Const., 8th Amdt.; N.Y. Const., art. I, §5). A maximum fine is set for traffic infractions and parking violations. (Vehicle and Traffic Law, §1800; New York City Charter, §883, subd. (a); Administrative Code of City of N.Y., §883a-3.0, subd. b). The actual parking fine which can be imposed is limited by law. The question posed in this case is whether the additional $50 charged for an illegally parked vehicle, beyond the stated fine, is, in fact, a penalty in disguise, imposed by the city beyond its authorized powers and to evade the limitation, or whether it is a reasonable charge for the actual expenses of removal of a vehicle blocking its streets.' 66 Misc. 2d 72.

By allowing the PVB to establish fines and penalties without being limited to an approximation of the expenditures in enforcement and collection, the statutes authorize the raising of revenues by New York City and other cities throughout the state. This is a power to tax. See discussion in 'The Administrative Adjudication of Traffic Violations Confronts the Doctrine of Separation of Powers', 49 Tulane L. R. 117, n. 126 (1974).

The use of a police power as a taxing device is a denial of due process in the taking of the property of the parking-law violators, because it has no reasonable relationship to the exercise of the police power. Furthermore, the stepped-up penalties or fees cannot be related to the enforcement of the police power because the parking offense has been terminated days or weeks before assessment of the stepped-up penalty or fee. See cases cited in the annotation to *Automobile Club of Missouri v. St. Louis*, 334 S.W. 2d 355, 83 A.L.R. 2d 612 (1960). (pp. 24-25).

In *Marder v. Massachusetts*, 377 U.S. 407 (1964), the Supreme Court said there was no substantial federal question when a statute permitted an alleged violator of parking laws to elect to be treated under a civil or a criminal procedure. . . . But this *Marder* case is totally inapposite to the issues involving plaintiff. . . .

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> Yet, the New York City PVB is extracting the higher (criminal) penalties and fines in its unconstitutional scheme of taxation and revenue raising." (p. 30).

Respondents did not meet any of these revenue issues in their brief in the Second Circuit, and the Second Circuit also ducked these obviously troublesome revenue issues by affirming the judgment of the District Court on the opinion of Judge Wyatt.

II.

Respondents argue that the petitioner "elected" to default on the summonses in question. This is not the basis for petitioner's complaint. Petitioner believed he had paid at least some of the alleged judgments in question and that he was being billed again for these same "judgments." He then tried to find out from the records in various Civil Courts in New York City exactly how much in outstanding parking ticket "judgments" he owed, but found out that these courts had no records underlying any of the "judgments" as to which petitioner was being required to pay, by threats from New York City marshals armed with purported "executions." At this time, petitioner tried to open up the alleged "judgments" in the court which purported to have entered the "judgments," and he was told (based on the memorandum by Administrative Judge Thompson) that he could not open up such "judgments" in the Civil Court. In fact, the memorandum stated that the "judgments" against petitioner were not in fact judgments of the Civil Court. Petitioner was directed by the Civil Court to return to the Parking Violations

Bureau, which demanded that he pay all of his outstanding "judgments" before he would be allowed to contest any of them, on the grounds of alleged prior payment. In fact, as the record shows, the petitioner was being billed twice as to some (but not all) of the parking ticket "judgments" in question (A124).

III.

Respondents are attempting to hide from the issues by claiming the respondents fall within the *Dugan* rationale, which case was distinguished in *Ward*. *Dugan* is totally inapposite, because the official had no executive responsibilities whatsoever. Petitioner in the instant proceeding has a different situation. He did not sue the persons who adjudicate parking tickets or who issued the parking tickets. Instead, he sued the New York City officials (Beame and Goldin) charged with the executive responsibility of raising revenue for New York City and their appointee (Hinkson, Director of the Parking Violations Bureau) who carries out the Beame administration policy of raising substantial revenues in excess of related expenses through a motorist trap operation (p. 4 of Memorandum of Law dated January 30, 1975 — Doc. No. 14 in Index to Record, A106; Par. 18 of the Amended Complaint, A11).

The extent of respondents' control over the judicial functions of the hearing examiners and various types of New York City employees who issue parking tickets was not obtained by petitioner in the District Court because the discovery sought by petitioner was denied. See excerpts from petitioner's request for documents in Point IV below.

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Petitioner is claiming that the Parking Violations Bureau and its officials are instrumentalities of defendants Mayor Beame and Comptroller Goldin and, to a lesser extent, of Elbert Hinkson, Director of the Parking Violations Bureau. Hinkson was appointed by the other defendants and holds office at their pleasure. He appoints the hearing officers, and enforces any parking ticket or conviction quotas (see Point IV) to accomplish the revenue-raising objective.

The revenue-raising objective of this instrumentality becomes crystal clear upon reading the following editorial in the April 17, 1976 edition of the New York *Daily News*, at p. 17:

"THE CAT'S OUT OF THE BAG

Many New Yorkers have been suspicious for a long time that the cops are on a ticket-writing, tow-away blitz. Those fears were confirmed Thursday by none other than First Deputy Mayor John Zuccotti.

The game plan goes like this: In order for 208 recently rehired cops to keep their jobs, the Police Department and the Beame administration worked out a deal that would soak motorists to the tune of $1 million between now and the end of the city's fiscal year on June 30.

The whole thing smacks of old-fashioned Southern speed traps. Enforcing the motor vehicle laws is one thing. But a cynically

> deliberate revenue-raising campaign is quite another. It is, to put it mildly, unconscionable."

The foregoing quotation and paragraph are offered as "intervening matter not available at the time of" petitioner's "last filing," under subdivision 5 of Rule 24 of the Rules of the Supreme Court. Respondents' reliance upon *Dugan* shows the existence of substantial federal questions relating to revenue-raising. Respondents' only argument concerns one of the two revenue-raising issues presented and is based on disputed facts concerning the responsibilities of the respondents.

IV.

Because of the improvident grant of summary judgment in the District Court below and affirmance in the Second Circuit, petitioner was not given the opportunity to obtain discovery of respondents, to ascertain the extent to which the hearing examiners of the Parking Violations Bureau and the persons who issue parking tickets are independent of respondents, and the extent to which net revenues are being raised through New York City's parking ticket business. Pursuant to a request to produce documents, dated December 23, 1974 (Doc. No. 7 in the Index to the Record), petitioner sought unsuccessfully to obtain documents relating to the foregoing issues, as follows:

> Documents evidencing or relating to:
>
> A. Collection procedures, including collection quotas or goals.

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C. Quotas or goals relating to the issuance of parking tickets.

D. Quotas or goals for hearing officers.

H. Studies of the cost of ticket issuance and other enforcement of the parking ticket laws, rules and regulations.

I. Studies or analyses of the costs of collection of parking ticket fines and/or penalties.

J. Statistics on the amount of fines and penalties assessed and/or collected.

K. Selection, appointment, removal, promotion and compensation of hearing officers, meter maids, policemen, sanitation personnel and others who issue parking tickets.

V. All instructions given to data processing personnel or companies relating to issuance of traffic tickets, collection, payment, registration of motor vehicles, scofflaw certification, liens on real property, and compilation of statistics on parking tickets.

W. Statistics, reports, studies and analyses of the disbursement of all fines and penalties and other payments collected or received by or on behalf of the Parking Violations Bureau.

Z. Studies or statistics relating to any revenues or profits attributable to issuance of parking tickets and or enforcement thereof.

AA. Any records or statistics relating to the cost of issuance or enforcement of parking tickets.

CC. Instructions or procedures relating to the issuance of parking tickets.

DD. Communications with employees of the Parking Violations Bureau, Police Department, Sanitation Department or any union representing any of such personnel regarding the amount of any revenues or profits earned by New York City with respect to issuance of parking tickets.

FF. Income from the investment of fines or penalties received by or on behalf of the Parking Violations Bureau of New York City.

GG. Studies or analyses on the revenues or profits produced by any categories of employees of the Parking Violations Bureau or other agency of New York City.

HH. Studies or analyses on the number of tickets issued by personnel of (a) Parking Violations Bureau; (b) police department personnel; (c) sanitation department personnel; and (d) any other New York City personnel.

JJ. Schedule of salaries.

NN. Statistics on the cost of appeals and/or Article 78 proceedings.

SS. All other by-laws, rules, regulations, manuals, memoranda, instructions or other documents relating to any practices, policies or procedures of the Parking Violations Bureau.

TT. Schedule of fines and penalties.

In light of the foregoing, it does not seem possible for respondents to argue, in good faith, that the constitutionality of revenue-raising by issuance of parking tickets was not raised by petitioner from the very inception of the action.

CONCLUSION

For the foregoing additional reasons, the petitioner's petition for a writ of certiorari should be granted.

Respectfully submitted,

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